UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

DAVID OPPENHEIMER,	§	
Plaintiff	§	**CA No. _________**
	§	
	§	
v.	§	
	§	
VYBE SUNGLASSES, LLC	§	
JAMES ANDREW ENGLISH, and	§	
CHASE ANDREW DENISON	§	
Defendants	§	**JURY DEMANDED**
	§	

PLAINTIFF'S ORIGINAL PETITION

---

1. Plaintiff, David Oppenheimer ("Oppenheimer" or "Plaintiff"), for his complaint against Defendants, Vybe Sunglasses, LLC ("Vybe"), James Andrew English ("English"), and Chase Andrew Denison ("Denison") (collectively "Defendants"), alleges:

JURISDICTION/VENUE

2. Oppenheimer's claims arise under the copyright laws of the United States, 17 U.S.C. 101 *et. seq.*, (hereinafter the Copyright Act.), and 17 U.S.C. § 1202 *et seq.* of the Digital Millennium Copyright Act ("DMCA").

3. Subject matter and personal jurisdiction is vested in this Court pursuant to 28 U.S.C. 1338. Additionally, this Court has subject matter jurisdiction under 28 U.S.C. 1331 inasmuch as this claim arises under the copyright laws of the United States. Venue in this judicial district is proper pursuant to 28 U.S.C. 1400(a) and 28 U.S.C. 1391(b) and (c).

THE PARTIES

4. Plaintiff is a citizen of North Carolina engaged in the business of professional photography who resides in and has a principal place of business in Asheville, Buncombe County, North Carolina.

5. Vybe is in the business of advertising, marketing, and sales of retail sunglasses whose principal place of business is in Raleigh, North Carolina. Vybe's registered agent for service of process is J. Andrew English. Vybe will receive actual notice of this filing by service upon its Registered Agent at the registered address for process, 3717 National Drive, Suite 104, Raleigh, NC 27612, Wake County.

6. English is an individual residing in Raleigh, North Carolina, who is the president, officer, director, manager and/or other principal of Vybe. English resides at 3221 Belspring Ln, Raleigh, NC 27612, Wake County, where he will receive actual notice of this filing, by personal service of process upon him.

7. Denison is an individual residing in New York, New York, who is the founder, officer, director, manager and/or other principal of Vybe. Denison resides at 71 2^{nd} Ave, Apt. 4, New York, NY 10003, New York County, where he will receive actual notice of this filing, by personal service of process upon him.

INTRODUCTORY FACTS

8. Oppenheimer is a professional photographer, and is the author (photographer) of, and at all times relevant to this claim, has been and is now the sole owner and proprietor of all right, title and interest in and to the copyrights in certain photographs known as *"Photography by David Oppenheimer from Winter of 2013"* **(Exhibit 1).** Oppenheimer owns certain rights in and to Copyright Registration Number VAu 1-132-213 issued on March 11, 2013 by the U. S. Registrar of Copyrights in Washington, D.C. for photographs deposited with and covered by said

registration. One photograph – depicting Appalachian State University (the "Appalachian State Image") – deposited with this application for registration is at issue in this case (**Exhibit 2**). Oppenheimer has complied in all respects with Title 17 of the United States Code (Copyright Act of 1976) and all other United States laws governing copyrights, and has secured the exclusive rights and privileges in and to the copyrights to the said photograph.

9. Oppenheimer's copyrights in the above-described works are presently valid and subsisting, and were valid and subsisting from the moment of their creation in the year 2013, and all conditions precedent to the filing of this suit have occurred.

CONTEXTUAL & INFRINGEMENT FACTS

10. On April 6, 2014, Oppenheimer discovered that his Appalachian State Image had been "scraped" from Oppenheimer's licensing company's website, at www.performanceimpressions.com, and placed onto Vybe's website at the following URL: http://www.vybesunglasses.com/#!meet-chris/exi0. (**Exhibit 3**).

11. When Oppenheimer checked his records, he found that he had never licensed the copyright-protected Appalachian State Image to any of the Defendants.

12. In addition to posting infringing copies of Oppenheimer's copyright-protected image on Defendants' website for purposes of advertising, marketing and/or promotion, on information and belief, one or more of the Defendants removed Oppenheimer's copyright management information, which was prominently displayed on the Appalachian State Image. Moreover, one or more of the Defendants had a financial interest in the infringing activities, and/or realized profit attributable from the infringing activities, described in paragraphs 10 and 11 above.

13. On February 12, 2016, Oppenheimer tendered a letter to Vybe and English informing them about the infringement of the Appalachian State Image, but never received a response. (**Exhibit 4**)

14. In March of 2017, Oppenheimer's counsel followed up with Vybe and English, but again, received no response to that email (**Exhibit 5**).

15. Settlement efforts have proved unsuccessful, and so this suit was filed.

VICARIOUS LIABILITY OF PRINCIPALS

16. Oppenheimer realleges and incorporates paragraphs 1 – 14 hereinabove as if recited *verbatim*.

17. Inasmuch as English and Denison are the current principals and/or managers of Vybe, or otherwise have control of Vybe, they had knowledge of the activities constituting infringemet, and/or had a financial interest in the activities constituting infringement.

18. In addition, English and Denison had the ability to prevent Vybe from infringing Oppenheimer's image, and/or to stop the infringement once it began. Additionally, on information and belief, as the owners, officers, directors and/or managers of Vybe, English and Denison received pecuniary benefit from Vybe's acts of infringement.

19. Accordingly, English and Denison are personally liable to Oppenheimer as a joint and/or contributory infringers, or are otherwise vicariously liable for the actions of Vybe.

CAUSES OF ACTION

20. Plaintiff re-alleges and incorporates, as if set forth herein, paragraphs 1 through 20 above.

21. Defendants have infringed Plaintiff's copyrights in and to the above-described image by scanning, copying, reproducing, distributing, publishing and/or otherwise using, unauthorized copies of said photographs within the United States in violation of the copy rights of Title 17.

22. Additionally, Defendants violated the DMCA by removing or having others remove Oppenheimer's CMI.

23. In accomplishing the infringements identified above, upon information and belief Defendants intentionally removed and/or omitted Plaintiff's CMI from copies of Plaintiff's works, or had others do so.

24. Upon information and belief Defendants distributed copies or derivatives of such works, or had others to do so, knowing that such CMI had been removed or omitted without authorization.

25. At the time Plaintiff's copyright management information was removed from copies of his work, and at the time they distributed copies of the works from which the copyright management information had been removed or omitted, Defendants knew or had reasonable grounds to know that such behavior would induce, enable, facilitate, and/or conceal the infringement of Oppenheimer's copyrights.

26. Oppenheimer is entitled and seeks to recover statutory damages from Defendants not exceeding $25,000 for *each act* committed in violation of his rights under 17 U.S.C. § 1202.

27. Pursuant to 17 U.S.C. § 1203(b)(5), Oppenheimer is entitled and seeks to recover his reasonable attorney's fees.

CAUSATION/DAMAGES

28. As a direct and proximate result of Defendants' above-described acts of copyright infringement and DMCA violations, Oppenheimer has sustained actual damages in an amount not yet ascertained, but which is believed to be in excess of $150,000. Such actual damages include, but are not limited to, lost profits and/or lost licensing revenue, disgorgement of defendants' profits attributable to their infringements, statutory damages, research time tracking down and documenting the infringements, attorney time spent placing joint infringers on notice of the infringements, and getting the images removed from servers and web sites. In addition to damages

for copyright infringement, Plaintiff seeks recovery of DMCA penalties as set out in paragraphs 22 - 28 above.

RELIEF REQUESTED

29. Oppenheimer demands an accounting by Defendants of their activities in connection with their infringements of his copyrights in and to the above-described and attached works, as well as their gross profits and income derived therefrom.

30. Oppenheimer is entitled and seeks to recover actual damages plus the profits of Defendants attributable to the infringements, as well as DMCA penalties not exceeding $25,000 for each act committed of his rights under 17 U.S.C. § 1202.

31. Alternatively, because the image was registered prior to Defendants' infringements, Oppenheimer is entitled to and seeks to recover statutory damages up to but not exceeding $150,000 (One Hundred Fifty Thousand Dollars) per work infringed, plus reasonable and necessary attorney's fees.

Oppenheimer DEMANDS JUDGMENT AS FOLLOWS:

32. Defendants, their agents, employees and/or servants be enjoined *pendente lite* and permanently from infringing Oppenheimer's copyrights in any manner whatsoever, and from publishing through any visual media, and from selling, marketing or otherwise distributing any of his images;

33. That Defendants be required to deliver up, under oath, for impounding during the pendency of this action, and for destruction thereafter, all images which infringe Oppenheimer's copyrights, and all prints, film negatives, magnetic tapes, digitally scanned and/or stored images, and all other articles by means of which such infringing copies may be reproduced, which are in the possession or under the direct or indirect control of Defendants;

34. That Defendants be required, jointly and severally, to pay over to Oppenheimer his actual damages sustained, in addition to all their profits attributable to the infringements, and which are not taken into account in computing Oppenheimer's actual damages incurred as a result of Defendants' copyright infringements described herein;

35. In the alternative, at Plaintiffs' option, that Defendants be required, jointly and severally, to pay over to Oppenheimer an award of statutory damages in lieu of actual damages for the infringement of any one or more of his works described above, in an amount ot be determined by the jury;

36. That Defendants be required, jointly and severally, to pay over to Oppenheimer an award of statutory damages for each and every violation by Defendants of the DMCA, 17 U.S.C. § 1202, *et seq*.;

37. That Defendants provide an accounting of all gains, profits and advantages derived by them as a result of the willful and unlawful acts of copyright infringement above-described;

38. That Defendants jointly and severally be ordered to pay to Oppenheimer his costs and attorney's fees; and

39. That Oppenheimer have such other and further relief as this court shall deem just and proper.

DEMAND FOR JURY TRIAL.

Plaintiff, David Oppenheimer, demands a jury trial in this cause of action.

Respectfully submitted,

By: *_/s/ Dana A. LeJune*

Dana A. LeJune
TBN: 12188250
6525 Washington Avenue
Suite 300
Houston, Texas 77007
713.942.9898 Phone

713.942.9899 Facsimile
dlejune@triallawyers.net